

Served: December 17, 1997



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 17th day of December, 1997

Joint Application of

AMERICAN AIRLINES, INC.

and

BRITISH AIRWAYS PLC

under 49 U.S.C. Sections 41308 and 41309
for approval of and antitrust immunity for
alliance agreement

Docket OST-97-2058

**ORDER ON PETITIONS FOR RECONSIDERATION
CONCERNING EVIDENTIARY ISSUES**

I. Background

On January 10, 1997, American Airlines, Inc. ("American") and British Airways PLC ("British Airways") (together "the Joint Applicants") filed in Docket OST-97-2058 an application for approval of and antitrust immunity for an "alliance agreement" (referred to also as "the Alliance") under 49 U.S.C. §§ 41308 and 41309.¹ The Joint Applicants also filed a motion under Rule 39 of the Department's Rules of Practice, 14 C.F.R. § 302.39, for confidential treatment of documents submitted in support of that application.

In Order 97-9-4, issued September 5, 1997, we directed the Joint Applicants to file, by September 10, 1997, in this docket their *in camera* documents, information, and data.

¹ The application defines the "alliance agreement" to include the June 11, 1996, agreement to develop and carry out the alliance, any implementing agreements concluded pursuant to that agreement, and any subsequent agreements or transactions by the Joint Applicants pursuant to such agreements. In broad terms, the Alliance contemplates (a) coordination, through a joint venture or otherwise, of all passenger and cargo services that the two carriers operate between the U.S. and the European region and beyond, with profit sharing on North Atlantic alliance services, (b) code-sharing across each party's global networks where permitted by governmental authorities, and (c) worldwide reciprocity for mileage credit accrual and travel award redemption between frequent flyer programs of the Joint Applicants. The Alliance does not involve any exchange of equity or other forms of cross-ownership. Application, at 1-4.

Specifically, we directed American to file those documents described in its March 31, 1997, submission as: II.1, 4-5, and 7-14; III.1-24, 26-30, and 35-41, and those described in its July 25, 1997, submission as: II.4; III.1-4, 6-15, 17-24, 26-29, 31-37, 39-72, 74-98, and 100-111. We also directed British Airways to file those documents described in its April 7, 1997, submission as: 2, 5-22, 26-63, and 66-72, and those described in its July 25, 1997, submission as: 1-24, 26-27, 29, 31, 33-54, 63-68, 71-78. At that time, we found that certain American and British Airways materials need not be filed in the docket, reserving our right subsequently to determine, at any time, that those American and British Airways materials are relevant to specific issues in our evaluation of this proceeding and therefore must be placed in the docket.²

II. Petitions for Reconsideration

On September 19, 1997, American and British Airways separately filed petitions for reconsideration of Order 97-9-4, to the extent that the order required them to file “extremely sensitive documents” for which they had requested *in camera* review by Department staff.³

American stated that the documents that it seeks to withhold from the record fall into the following categories:

- (1) Division of Benefits Between American and British Airways, or Analyses of the Proposed Arrangement That Would Enable Such Benefits To Be Calculated; Valuation of the Alliance

March 31, 1997: Items II.5, 8-10 and Items III.23-24, 28

July 25, 1997: Item III.107

- (2) Internal Valuation of the Alliance Under Various Regulatory Scenarios

March 31, 1997: Item III.30

July 25, 1997: Items III.7, 9, 11, 13, 23, 26-28, 31, 34-35, 37, 44, 47, 53, 55-56, 63, 65-66, 69-70, 80, 83

- (3) American's Future Code Sharing or Alliance Initiatives With other Airlines

March 31, 1997: Item II.12 and Items III.1-2

July 25, 1997: Items III.1, 12, 14, 21-22, 41-43, 48, 57, 84-85

² Order 97-9-4 at 18-19.

³ By Notice dated September 12, 1997, we granted the Joint Applicants' September 9, 1997, motion for an extension of time until September 19, 1997, for them to comply with our document demand and for any party to file petitions for reconsideration of Order 97-9-4.

(4) Potential Sources of London/Heathrow Slots and Slot Valuations

March 31, 1997: Item II.4 and Items III.35-36, 38

July 25, 1997: Items III.3, 8, 36, 39

(5) Frequent Flyer Analyses, Including Those Showing Potential Diversion of Traffic Between American and British Airways

July 25, 1997: Items III.18, 20, 51-52, 54, 58-62, 68, 71-72, 74-77, 81-82

(6) Traffic and Revenue Projections Based on Proprietary Analytical Tools

March 31, 1997: Item II. 7 and Items III.37, 39-41

July 25, 1997: Items III.4, 54, 59, 60-62, 78 ⁴

(7) Analyses of Potential Alternatives to a Fully Immunized American/British Airways Alliance

July 25, 1997: Item II.4 and Items III.33, 49-50, 79

(8) Attorney/Client Privilege

March 31, 1997: Item II.11

American asserted that none of the above itemized material is relevant to the ability of “any interested party” to participate fully in this proceeding. American maintains that it and British Airways have submitted “far more material than the Department has ever required in similar proceedings;” that interested parties have had sufficient time to examine the record of this case; and that American’s competitors know “far more about both the alliance and American’s other business plans than American knows about theirs.” Therefore, American urged the Department to reconsider Order 97-9-4 with respect to the above listed documents and to vacate the requirement that these documents be submitted in the docket.

British Airways endorsed and incorporated by reference American’s argument in support of its petition for reconsideration. British Airways stated that the following documents directed by the Department to be filed in the docket are not relevant to the Department’s consideration of the public interest issues involved in this proceeding, and are of such sensitivity that their release to British Airways’ competitors, even under the Department’s Rule 39 confidentiality affidavit procedure, is likely to cause competitive injury to British Airways.

⁴ Items III.54, 59, and 60-62 are also listed in item 5 above (frequent flyer analyses).

British Airways stated that the documents that it seeks to withhold from the record fall into the following categories:

(1) Strategic Business Plan

April 7, 1997: Document 18

(2) Division of benefits between British Airways and American, or analyses of the arrangement that would enable such benefits to be calculated, and valuation of the alliance

April 7, 1997: Documents 13, 67-68

July 25, 1997: Documents 2, 6-7

(3) British Airways' potential future alliance initiatives with other airlines

April 7, 1997: Documents 53, 69

July 25, 1997: Documents 41-45, 47-49, 51, 54

(4) London/Heathrow/Gatwick Airport slot valuations and operations

July 25, 1997: Documents 67-68, 71-73

(5) Frequent flyer analyses, including British Airways and American division of benefits

July 25, 1997: Documents 5, 8

(6) Analysis of potential alternatives to a fully immunized alliance

July 25, 1997: Documents 9

III. Responsive Pleadings

On September 29, 1997, Continental Airlines, Inc. ("Continental"), Delta Air Lines, Inc. ("Delta"), Trans World Airlines, Inc. ("TWA"), US Airways, Inc. ("US Airways"), United Air Lines, Inc. ("United"), and Virgin Atlantic Airways Limited ("Virgin Atlantic") filed answers opposing the Joint Applicants' motions to reconsider the Department's *in camera* document determinations.⁵

⁵ On October 17, 1997, Delta filed an answer and motion for confidential treatment under Rule 39 requesting that the Department consider this case in the broader context of a consolidated proceeding encompassing the American-TACA Group code-share services proceeding (*see* Docket OST-96-1700), and the American-Iberia Lineas Aereas de Espana, S.A. code-share services proceeding (*see* Dockets OST-97-2965 and OST-97-2966). On October 20, 1997, American filed a motion to strike Delta's answer and for sanctions for violating the confidentiality procedures of this docket. On October 21 and 29, 1997, Delta and Continental, respectively, filed answers opposing American's pleading. We will address these concerns by subsequent order.

Continental

Continental argued that the Department correctly ordered the submission of relevant documents, and that the Joint Applicants have provided no justification for reconsideration of Order 97-5-4. Continental maintains that the Joint Applicants' argument that this information is "extremely sensitive" and can be excluded from the record of this case is not compelling. Rather, Continental asserts that the standard for *in camera* review is relevance, not commercial sensitivity of the information. Continental states that precedent confirms that relevant documents with commercially or competitively-sensitive information should be filed in the docket (Order 95-11-5 at 6-7).

Continental argues that each of the documents being withheld by the Joint Applicants goes to the "very heart" of competition and public interest issues raised in this application. Continental maintains that this material will assist the Department in its investigation of whether there exists any reasonably available alternatives to this alliance that are materially less anticompetitive, such as new, increased access to Heathrow Airport.

Delta Air Lines

Delta maintains that the Joint Applicants' relevancy arguments are no more persuasive than their previous claims and continue to be based on "simple conclusory statements." Delta says that each category of information being withheld by the Joint Applicants should be filed in this docket. Delta states that after a thorough consideration to the Joint Applicants' request for exclusion of certain information and documents, including *in camera* reviews, the Department concluded that numerous materials, which the Joint Applicants refuse to submit in the record of this proceeding, are relevant and must be filed in the docket, and that the Department should be reluctant to withhold from the record a document that it has already determined to be relevant. Finally, Delta notes that the Department has already determined that commercial sensitivity of information is not a sufficient basis to withhold documents from the record. Delta argues that if the documents are relevant they must be submitted in the record before this case can proceed.

TWA

TWA states that the Joint Applicants propose a substantially different standard of relevance than previously used by the Department in this and other cases. TWA says that the issue is not whether interested parties need the documents to prove their case, rather it is whether the withheld documents are relevant to the issues of this case.

United Air Lines

United requests that the petitions of American and British Airways for reconsideration of Order 97-9-4 be denied insofar as they request the Department to reverse its ruling on the relevance of the documents identified therein. United argues that the Department's staff has either reviewed these materials, or summaries of them specifically drafted by the Joint Applicants. As a result, the Department has already determined the documents to be relevant, and the Joint Applicants have offered no valid, substantive argument why the Department should reverse its earlier ruling. Therefore, due process requires that these documents be available for review and analysis by opposing parties. United maintains that the Joint Applicants' argument that the materials are "sensitive" is irrelevant to the issue here.

US Airways

US Airways states that the documents that the Joint Applicants seek to withhold from scrutiny are "unquestionably" relevant. US Airways argues that the Joint Applicants have failed to demonstrate that the documents at issue are not relevant, and US Airways maintains that relevance is the only issue in this matter. Having already determined that the documents are relevant, US Airways states that the Department would "commit plain legal error" if it were to reverse its finding based on American's and British Airways' assertions that the documents are highly sensitive.

Virgin Atlantic Airways

Virgin maintains that the Joint Applicants provide no basis for the Department to reconsider its earlier determinations in this matter. Virgin says that the Joint Applicants merely persist in their arguments that the documents contain commercially sensitive information and are irrelevant.

Virgin argues that the Joint Applicants' petitions fail to satisfy the Department's requirements for reconsideration in that the petitioners fail to demonstrate either clear error or new evidence. Virgin states that the Joint Applicants' arguments about commercial sensitivity are irrelevant. Virgin argues that the applicants' petitions add nothing to arguments about irrelevancy that the Department has not already considered and rejected. Virgin also says that there is simply no basis for the Department to exempt the Joint Applicants from its evidence relevancy requirement based on their assertion that they have already filed enough information.

IV. Interim Determinations

By Order 97-11-5, issued November 4, 1997, the Department accepted in part the Joint Applicants' petitions. At that time, the Department found it appropriate to review *in camera* (1) American's documents identified in its July 25, 1997, index as item III.78 (identified as AA0029588-619), and item III.84 (identified as AA0025839-43); and

(2) British Airways' document identified in its April 7, 1997, submission as item 18 (identified as BAP135308 - 135352). At that time, the Department stated that it would thereafter determine whether to grant the Joint Applicants' requests that we rescind the order requiring the filing of those documents for the record in this docket. The Department noted that its examination of these specific documents, however, did not constitute either an acceptance of the Joint Applicants' petitions, except as provided therein, or an inclusion of these specified documents into the record, or a ruling on the merits of any issues raised by the several petitioners in this case. Finally, the Department found that it would resolve those matters by subsequent order.

V. Findings and Conclusions on Reconsideration

We have carefully considered the pleadings filed by American and British Airways and the responses by interested parties, and have decided to grant the Joint Applicants' requests for reconsideration of Order 97-9-4, to the extent that it required them to file "extremely sensitive documents" for which they had requested *in camera* review by the Department. Based on our reconsideration, we find that the Joint Applicants have not presented any arguments or evidence that would justify reversal of the actions taken in Order 97-9-4, except as noted. We therefore affirm, in part, our earlier findings, and we will require that the Joint Applicants file specific documents, information, and data in the docket, as more fully described below.

The Joint Applicants have withheld from their responses to our informational directive detailed in Order 97-9-4 certain documents, information, and data that they have characterized as "extremely sensitive documents." The Joint Applicants maintain that none of this withheld material is sufficiently relevant, either to the ability of any interested party to participate fully in this case or to the issues of this proceeding, to outweigh the commercial harm that its limited disclosure could cause. The applicants have requested that we again review this material to determine its relevance to this case.

We do not agree with the Joint Applicants' assertion that, for purposes of compliance with our information directives, the relevance of documents should be affected by or weighed against their alleged sensitivity. The latter is an issue to be resolved in the context of our confidentiality procedures. Nor do we accept their assertion that relevance should be measured by the effect of the documents on the ability of parties to participate in the proceeding. The sole question is whether, in our judgment, the information is relevant to a decision by the Department on the merits of the application. We have granted reconsideration of our order in this instance as a matter of discretion, both to affirm our standard for requiring the production of documents for the record, and for the limited purpose of reviewing our previous determinations on the relevance of certain documents based on the Joint Applicants' index descriptions.

Upon reconsideration based on the characterizations provided in the Joint Applicants' "Vaughn Indices," we have determined that the information identified by American as Item II.11, submitted on March 31, 1997, is not relevant to specific issues currently

determined to be relevant to our evaluation. Nonetheless, if in the course of our analysis we determine that this information is relevant to our evaluation, we reserve the right to require that this document be filed in this docket.⁶

Upon reconsideration, the general descriptors for (1) American's documents identified in its July 25, 1997, index as item III.78 (identified as AA0029588-619), and item III.84 (identified as AA0025839-43); and (2) British Airways' document identified in its April 7, 1997, submission as item 18 (identified as BAP135308 - 135352) were not sufficiently detailed to allow us to determine their relevance,⁷ and accordingly we asked for and reviewed these documents on November 5.⁸ Based on that review, we again find that these materials withheld by American and British Airways are "relevant" to our public interest assessment of the merits of this application. A primary issue in this case relates to the impact on competition in any relevant market from the grant of antitrust immunity. Because the review material may contain certain information considered sensitive by the applicants, as with other documents covered by Rule 39 motions for confidential treatment, we will allow for limited interim access to these documents pending a decision on the basic Rule 39 motions. Accordingly, counsel and outside experts, for the interested parties only, may review the applicants' confidential documents under Rule 39, consistent with our previously established confidential affidavit procedures.

Finally, when the Department has determined that the Joint Applicants have fully complied with the findings of this order, we will announce an appropriate procedural schedule for the filing of answers and replies to this application. Moreover, the Department will decide the merits of any other issues/motions raised by the several petitioners in this case by subsequent order(s).

VI. Ancillary Access Issues

The Joint Applicants maintain that the confidentiality procedures established by the Department in this case have not sufficiently protected their "commercially sensitive materials." They argue that an unprecedented and unwarranted number of parties have accessed their confidentially filed materials using the Department's affidavit

⁶ Order 97-9-4 at 14.

⁷ As we have previously resolved, we expect applicants requesting advisory review by the Department to exercise precision in describing their material. Order 95-11-5 at 7, fn. 5.

⁸ By letter dated November 17, 1997, the Department notified British Airways that its submitted document was found incomplete, and the Department directed British Airways to provide it (item 18) for *in camera* review in its entirety. By letter dated November 25, 1997, counsel for British Airways informed the Department that Item 18 was a draft document and did not include the purported redacts identified. British Airways stated that work on the document was suspended shortly after October 16, 1996, and that the draft (without the attachments and table) was in fact the final version. Therefore, British Airways said that the Department had already reviewed Item 18 in its entirety.

procedures. While we agree with the applicants that this case has stimulated considerable public interest, we do not find that this increased public involvement has compromised the efficacy of our Rule 39 procedures.

We note that the Joint Applicants have challenged certain responsive pleadings, maintaining that the Department's affidavit procedures have been violated by certain interested parties. As stated earlier, we will address these concerns by subsequent order.

VII. Access to Documents

To ensure an expeditious investigation of these matters and provide the interested parties with a fair and adequate opportunity to review all confidential materials, affiants having filed valid affidavits may examine the documents at the Department of Transportation Department's Documentary Services location, and in addition, at the following locations provided by the Joint Applicants in Washington, D.C.:

- A. Sullivan and Cromwell, Counsel for British Airways, 1701 Pennsylvania Ave., N.W., 7th Floor, Washington, D.C. 20006 (contact Jeffrey W. Jacobs, 202.956.7510); and
- B. Carl B. Nelson, Jr., Associate General Counsel for American Airlines, 1101 - 17th Street, N.W., Suite 600, Washington, D.C. 20036, (202.496.5647).

A stamped copy of the affidavit filed with the Department of Transportation must be presented prior to document examination by an interested party.

Accordingly:

1. We grant the petitions of American Airlines, Inc., and British Airways PLC for reconsideration of Order 97-9-4, to the extent necessary to allow the Department's staff to review the documents described below;
2. We affirm, in part, the actions taken by the Department in Order 97-9-4;
3. We direct American Airlines, Inc. to file in this docket its *in camera* documents, information, and data described in its March 31, 1997, submission as: II.4-5, 7-10, and 12; III.1-2, 23-24, 28, 30, and 35-41; and those described in its July 25, 1997, submission as: II.4; III.1, 3-4, 7-9, 11-14, 18, 20-23, 26-28, 31, 33-37, 39, 41-44, 47-63, 65-66, 68-72, 74-85, and 107;

4. With respect to the American Airlines, Inc. material identified in its March 31, 1997, submission as II.11, this material need not be submitted at this time;
5. We direct British Airways PLC to file in this docket its *in camera* documents, information, and data described in its April 7, 1997, submission as: 13, 18, 53, and 67-69 and those described in its July 25, 1997, submission as: 2, 5-9, 41-45, 47-49, 51, 54, 67-68, and 71-73;
6. Except to the extent determined herein, we are deferring action on the Joint Applicants' motions for confidential treatment under Rule 39 of the Department's regulations (14 C.F.R. § 302.39);
7. We grant interim confidential treatment to the information described in ordering paragraphs 3 and 5, limiting access to this material to counsel and outside experts upon their filing of an affidavit stating that the person will preserve the confidentiality of the information and will only use it to participate in this proceeding. Further, regarding information afforded limited access by the Department, each affidavit must specifically indicate that the person(s) are counsel or outside expert(s) for the interested parties in this case;
8. We reserve the right subsequently to determine, at any time, that the material specified in ordering paragraph 4 is relevant to specific issues in our evaluation of this proceeding and therefore must be placed in the docket;
9. Interested parties may review the confidential materials, described in ordering paragraphs 3 and 5 as follows: (a) in the Docket Section at the U.S. Department of Transportation, Room PL 401, 400 Seventh Street, SW, Washington, D.C. 20590; (b) in the offices of Sullivan and Cromwell, Counsel for British Airways, 1701 Pennsylvania Ave., N.W., 7th Floor, Washington, D.C. 20006 (contact Jeffrey W. Jacobs, 202.956.7510); and (c) in the offices of Carl B. Nelson, Jr., Associate General Counsel for American Airlines, 1101 - 17th Street, NW, Suite 600, Washington, D.C. 20036, 202.496.5647. Interested parties shall submit in advance an affidavit stating that the person will preserve the confidentiality of the information and will only use it to participate in this proceeding. Further, each affidavit must specifically indicate that the person(s) are counsel or outside expert(s) for the interested parties in this case;⁹ and

⁹ Any pleading or other filing that includes or discusses information contained in the confidential documents must be accompanied by a Rule 39 motion requesting confidential treatment.

10. We shall serve a copy of this order on all persons on the service list in this docket.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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